No. 04-480

In the Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS, INC. ET AL.,
Petitioners,

v.

GROKSTER, LTD., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MEDIA STUDIES PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ROY I. LIEBMAN
520 8th Ave.
New York, NY 10018
(212) 340-0647

Attorney of Record for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 6

1. Promotion of education and scholarship is a core goal of copyright 6

2. Potential infringement is a central function in the acts of teaching and scholarship 6

3. Fair use is inadequate to grant confidence and predictability to educators and scholars in a digital age 8

4. Peer-to-peer technology has potential in education and research 9

5. Judging intent is counterproductive 12

6. Proposed standards would be inadequate to encourage education and research 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

In re: Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003) 12

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Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004) ..... *passim*

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are communication and media studies teachers and scholars who are American or have taught in the United States of America. We have been founders of or contributors to a broad array of approaches to the study of human communication: from historical accounts to analyses of institutions and economic functions to examinations of the dynamics of cultural habits at all levels of society. We have employed a variety of copying, archiving, editing, and distributing technologies in the course of our work. Without tools developed under this Court's rule in *Sony Corp v. Universal City Studios, Inc*, we would not be able to teach or conduct research effectively.

The following identifies the amici curiae who have joined this brief:

Kevin G. Barnhurst is Professor and Head of the Department of Communication at the University of Illinois at Chicago.

Stuart Ewen is Distinguished Professor in the Department of Film & Media Studies at Hunter College, and in the Ph.D. Programs in History, Sociology and American Studies at The CUNY Graduate Center (City University of New York), and Director of the MFA Program in Integrated Media Arts at Hunter College.

JoEllen Fisherkeller is Associate Professor in the

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[1] The parties' letters of consent to the filing of *amici* briefs have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution for preparing or submitting this brief.

Department of Culture & Communication, New York University.

Jib Fowles is Professor Emeritus of Communication at the University of Houston-Clear Lake.

Alexander R. Galloway is Assistant Professor of Media Studies in the Department of Culture & Communication, New York University.

Sut Jhally is Professor of Communication at the University of Massachusetts at Amherst and Founder & Executive Director of the Media Education Foundation.

Steve Jones is Professor of Communication at the University of Illinois at Chicago and Adjunct Research Professor of Communication at the University of Illinois at Chicago.

Mark Katz is Chair of the Department of Musicology at Peabody Conservatory, Johns Hopkins University.

Ted Magder is Chair and Associate Professor, Department of Culture & Communication, New York University.

Charlton McIlwain is Assistant Professor in the Department of Culture & Communication, New York University.

Kembrew Mcleod is Assistant Professor in the Department of Communication Studies, University of Iowa.

Jason Mittell is Assistant Professor of American Civilization and Film & Media Culture, Middlebury College.

Constance Penley is a Professor of Film Studies and Co-Director of the Center for Film, Television and New Media at UC-Santa Barbara.

Gilbert B. Rodman is Associate Professor of Communication at the University of South Florida.

Andrew Ross is Professor of American Studies, New York University.

Vivian Sobchack is Professor in the Department of Film, Television and Digital Media and Associate Dean, School of Theater, Film & Television, UCLA.

Jonathan Sterne is Assistant Professor in the Department of Art History and Communication Studies at McGill University.

Theodore G. Striphas is Assistant Professor of Media and Cultural Studies in the Department of Communication & Culture, Indiana University.

Siva Vaidhyanathan is Assistant Professor in the Department of Culture & Communication, New York University

Linda Williams is Professor of Film Studies, University of California, Berkeley.

George Yudice is Professor of American Studies and Spanish and Portuguese Languages and Literatures and Director of the Center for Latin American Studies at New York University.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are deeply concerned that recent legal, commercial, and political turmoil surrounding the proliferation and use of "peer-to-peer" communicative technologies threaten to chill legitimate contributions to teaching and research in this nation's institutions of higher education. This Court and the United States Congress have clearly articulated the value of education and scholarship to the workings of the Republic. Further, both acknowledge that teaching and research often require the unauthorized copying, distribution, re-fashioning, and performance of copyrighted works without permission from the copyright holder, and thus have cleared a space within the strictures of copyright law to allow for such publicly beneficial uses. The foundation of that space is "fair use," which, though an affirmative defense to the accusation of infringement, has granted educators a certain measure of comfort that they would not be sued by copyright holders for infringement. However, the penumbra of perceived "users' rights" that emanate from Sec. 107 of the Copyright Act has proven inadequate to protect many important acts central to teaching and research. Within this context, the academic utility of searching, indexing, and sharing of copyrighted materials remains in doubt among educators and scholars. Doubt creates a chilling effect, stifling the most creative uses of digital technology in the classroom or in academic research. This chilling effect is the result of a fundamental misunderstanding of the nature of peer-to-peer systems. Peer-to-peer technology is not functionally distinct from other, more familiar, less demonized methods of resolving communicative processes such as sending e-mail, creating hyperlinks, and employing search engines such as Google.com. All of these functions potentially (and commonly) infringe the copyrights of others. With this in mind, we conclude that

the standard set forth by the Seventh Circuit Court of Appeals in *In Re Aimster* is inadequate to protect the activities of educators and researchers. In fact, it is counterproductive. The problem with the standard that technologies that are capable of substantial non-infringing uses comes not from the question of capability, but from the fact that within the classroom "non-infringing" is so unclear. The *Aimster* standard would add another layer of complexity and doubt to the educational project. Therefore it would hinder "the progress of the sciences and useful arts." In contrast, the unambiguous declaration by the Ninth Circuit Court of Appeals in *Grokster* -- that the standards this Court set forth in *Sony* are alive and appropriate for this digital age -- does grant educators comfort and confidence. Nor do certain "compromise" positions outlined in briefs submitted in support of neither party in this case protect the interests of educators and researchers. Ultimately, we wish to encourage the Court to consider that *Sony* did more than legalize home taping and "time shifting." It democratized participation in the project of recording the collective memory of this dynamic nation. *Sony* went beyond the traditional parameters of fair use and showed the potential for an emerging set of clearly articulated "users' rights." Teachers, scholars, critics, journalists, fans, and hobbyists would all benefit greatly under a regime that offered them clarity and confidence about how they interact with works and the copyright system that governs them.

ARGUMENT

1. Promotion of education and scholarship is a core goal of copyright

When President George Washington declared his support for the first U.S. Copyright Act in 1790, he proclaimed that copyright would enrich American life by "convincing those who are entrusted with public administration that every valuable end of governance is best answered by the enlightened confidence of the public; and by teaching the people themselves to know and value their own rights, to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority."[i] Almost 200 years later, in the 1976 revisions of the Copyright Act, the United States Congress codified the values President Washington expressed by privileging educational uses of copyrighted materials.[ii] However, Congress did not foresee the potential that about-to-appear technologies would have on the educational mission – especially with regard to the study of the influence and effects of communication and media on American life. A legal environment that encourages technological innovation benefits far more than the technology industries themselves. Educators is among the chief beneficiaries of and contributors to a culture of experimentation and innovation. Education and innovation feed each other. For this reason, the practice of education remains a core purpose underlying the copyright system.

2. Potential infringement and innovation are central to teaching and scholarship

Almost every act of teaching relies on the substantial replication and revision of others' copyrighted works. Lectures, group projects, and assignments all rely on

copying, distribution, and performance of copyrighted works. Teachers necessarily and consciously induce such copying. Many of the basic tools of teaching such as distributing photocopies, performing copyrighted works in class, and viewing film and video in class, would usually constitute copyright infringements. Yet Congress acknowledges that these functions are central to the mission of adequately educating students who live in an increasingly media-saturated society.

New technologies made media education and study more dynamic, effective, and accessible. For example, the proliferation of video cassette recorders (and such ancillary products as inexpensive video cameras and editing machines) truly unleashed the potential for media education. We copy and thus potentially infringe with video technology. But we have done so under the presumed protection of fair use. But such fair uses would have been impossible without the video recorder, the video camera, and without the confidence in technological experimentation set free by the U.S. Supreme Court's ruling in *Sony Corp. v. Universal City Studios, Inc.* (*Sony*). Media education and scholarship never would have developed as an important field in college and university curricula and an increasingly important element of secondary education in the United States without such technology.[iii]

Newer digital technologies are even more promising for educators and students. The costs of production and reproduction have fallen. Media studies are no longer unidirectional fields, with information flowing from the front of the classroom to the back. Digital technology has become democratized to such a degree that the walls among instructor, student, creator, and audience have eroded. Every media student has the potential to build on the work of those who came before and comment critically on her media environments by answering in a multimedia, intertextual, dynamic manner, only because U.S. law has facilitated

technological experimentation that has in turn generated a flurry of curricular initiatives.

One of the best examples of the creative use of the technology liberated by *Sony* comes from the Media Education Foundation, established in 1991 at the University of Massachusetts at Amherst. Under the direction of Professor Sut Jhally and with assistance from students and the public, the Foundation has been collecting video clips of copyrighted media messages and images and assembling them into annotated and narrative videos for classroom use. The videos produced by the Foundation have had a profound effect on media education at all levels. Without the strong and clear message sent by Sony, the Media Education Foundation would not have been able to produce videos examining the sexist images promoted by MTV or the troublesome relationship between musicians and the major recording companies. None of the concerned companies would have cleared their images for use in a critical educational video.[iv] Sony made such productions – and many of the recent advances in higher education in general -- possible.

3. Fair use is inadequate to grant confidence and predictability to educators and scholars in a digital age

The Fair Use provisions of the Copyright Act, as delineated by Sec.107, did not by themselves grant the confidence sufficient to spark technological experimentation and curricular initiatives such as the use of video cameras and editing in the classroom or teacher-produced media education videos. Only in the wake of *Sony* did such innovation emerge. In recent years, as digital technologies and powerful networks have granted remarkable creative tools to scholars, teachers, and students, the climate of panic and fear induced by the uncertainties of fair use in the new digital environment

has generated a chilling effect. University and school administrators are cautious about or vehemently against experimenting with new methods of distribution, even for educational or research purposes.[v] For example, Professor Henry Jenkins at the Massachusetts Institute of Technology uses – as most media studies teachers do – clips and quotes from copyrighted works in his courses. On advice from MIT lawyers, the university has not allowed Jenkins to post the essential clips on its open courseware servers – only on server space closed to readers who are not registered MIT students. However, MIT allows students from Harvard University to take courses at MIT. Such material is inaccessible to Jenkins' students from Harvard. This situation has frustrated Jenkins and prevented him from teaching his course as effectively as he might under a more relaxed and confident legal environment.[vi]

4. Peer-to-peer technology uses in education and research

Many scholars use peer-to-peer technology in their work. Some seek a song or video clip that is out of print and unavailable in their libraries, so they use the vast publicly generated library of files as an efficient index and virtual library. Others are curious about the function of such systems and their effects on culture and the culture industries. Still others are fascinated by the software itself and strive to understand and perhaps improve it. One of the most exciting scholarly proposals is "Edutella," an open-source project that builds upon metadata standards to generate similar standards for peer-to-peer applications. This project will make searching using peer-to-peer interfaces more precise and effective, thus unleashing the distributed nature of the Internet to store essential documents redundantly and dependably. Maintaining central servers is costly for educational institutions so many information experts see distributed information as way to make educational resources

available to teachers and researchers who do not have access to large libraries or servers.[vii] Other similar initiatives include "OAI-P2P," an effort to link all data in open archives via a peer-to-peer search interface that would link all the metadata attached to all the content in all the databases, and "Bibster," an effort to exchange bibliographic metadata across many institutions.[viii]

Such scholarly peer-to peer experiments are benign and potentially valuable. Yet there mere suggestion that researchers employ peer-to-peer technology invites scrutiny and suspicion. The nature of peer-to-peer technology is widely misunderstood and the rhetoric surrounding it has been inflated and heated. Since the rise of Napster, a relatively centralized method of resolving information inquiries, popular accounts of the workings of peer-to-peer functions have described them as being substantially new and profound. Yet at their most basic level, most common procedures on the Internet are already peer-to-peer. Every Web page search involves a resolution of an inquiry through an index, and then a link to a server on which the desired file sits. Searches through commercial services such as Google.com work in ways very much like the original Napster: a centralized index that links seekers to files held on third-party servers. The services we commonly call "peer-to-peer networks" (Napster, Kazaa, Gnutella, Grokster, etc.) are merely methods of resolving information queries laid over the network of networks we already use: the Internet. The rise of such resolution interfaces represents a return to the early state of the Internet, when individuals generated and distributed content as well as consuming it.[ix]

However, recent moral panics about peer-to-peer distribution of copyrighted files has reached into the educational realm and disrupted reputable software engineering experiments that might yield better tools if allowed to flourish or fail outside the threat of civil judgments or state-imposed

restrictions. Jesse Jordan, a student at Rensselaer Polytechnic Institute (RPI) in Troy, New York, settled a lawsuit in 2003 for $12,000 after the Recording Industry Association of America filed suit against him for creating an indexed search engine for public folders on computers hooked up to the RPI computer network. Such a system would have been very helpful to those using the powerful university computer network. Often members of university communities host many volumes of reports, data sets, commentaries, reviews, teaching materials, and other libraries of data in remote corners of the network. Standard search engines only scan the indexed portions of the official sites and servers operated by university offices. But sometimes the best information sits on a connected computer on the edge of the network, virtually invisible to most researchers. Jordan's system might have opened up many more interesting files to the RPI community. Jordan himself copied no files. He issued no encouragements to students or faculty to post copyrighted materials. Yet the very act of experimenting with creative media technologies resulted in a lawsuit and forced a settlement.[x] Educators and students have learned much from anecdotes such as Jordan's. As a result, scholars hesitate from inventing or deploying innovative peer-to-peer indexes and resolution processes that might spread data and processing power among a series of underused computers rather than centralizing such functions on one expensive computer. Henry Jenkins at MIT could solve his content distribution problem by deploying a search engine like the one Jordan developed at RPI. But without clear legal guidance that would enable Jenkins and MIT lawyers to allow such experimentation confidently, Jenkins will not even try. More interesting than what scholars do with peer-to-peer technology is what they might not do if the current mood of panic fails to ebb. Many other uses of distributed computing or peer-to-peer indexing and resolution have yet to be imagined in the educational context. Yet, like the democratization of video production twenty years ago, there

is no way for anyone to predict the externalities (positive and negative) that might flow from granting confidence to scholars, teachers, and students. This court may grant such confidence by restating the relevance of *Sony* to the digital age and thus legitimate such curricular experimentation.

5. Judging intent of innovators is counterproductive

Sony, and the 9th Circuit ruling in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, (*Grokster*) now before this Court, clarified the distinctions between the production and distributions of technologies that could be used to infringe and the act of infringement themselves.[xi] In contrast, the 7th Circuit Court of Appeals in the case of *In re Aimster Copyright Litigation* (*Aimster*) diminished the protection that this court established in *Sony*. Judge Posner, writing for the Seventh Circuit, undermined the standard that any technology capable of substantial non-infringing use would be exempt from liability by concluding that "the seller of a product or service used solely to facilitate copyright infringement, though it was capable in principle of non-infringing uses, would be immune from liability from contributory infringement."[xii] In our view, the problem with the "capable" standard is not the question of mere capability: it is that in the educational context the concept of "non-infringing uses" is so unclear. Teachers used to assume that actions that are generally considered non-infringing in the classroom or lab – such as distributing copies of articles or showing films without payment or permission -- would almost certainly be considered infringing just outside the door. But since the Second Circuit ruling in *American Geophysical Union v. Texaco, Inc.* college and university counsels become have increasingly concerned about potential litigation surrounding the necessary use of copyrighted material.[xiii]

This is why it is a mistake to focus on the "intent" or actions of a technology creator. Once technologies are loose in the world, the developer has no control and minimal influence over how her devices work in the world. Users and customizers determine how technologies are revised, recombined, and recontextualized in use. For this reason, the "capability" standard is not unreasonable or unworkable. It empowers courts and Congress to see how uses unforeseen by the initiator of a technological phenomenon develop. As study of the history of film technology demonstrates, Thomas Edison not only would have failed to foresee *The Lord of the Rings* trilogy, he might have done all he could to prevent it. Edison saw no market in long, expensive, narrative films. So he declined to invest in stories that demanded highly paid actors or rights to be cleared for well-known stories. In addition, he deployed his patents over filmmaking and projection technology to limit competition from firms like American Biograph and Mutoscope that were interested in making narrative films. Had Edison prevailed in his efforts to limit innovation, Hollywood might never have grown as it did.[xiv]

6. Proposed standards would be inadequate to encourage education and research

In a brief submitted in support of neither party in this case, the Digital Media Association, Netcoalition, the Center for Democracy and Technology, and the Information Technology Association of America argue that this court should substantially revise the *Sony* standard to consider whether the promoter of the technology actively encourages its users to infringe. Within the educational context, in which many if not most acts of knowledge distribution and creation involve an overt copying (and perhaps, therefore, infringing), such a standard would generate another level of doubt, anxiety, and misunderstanding. It would certainly chill the

development of creative uses of peer-to-peer indexing and resolution systems within the academy.

CONCLUSION

Sony cleared out space and confidence for both technological innovators and users. More than any other recent case, it set out hopes for a clear set of users' rights that go beyond the mere affirmative defense offered by Fair Use. We plead with the Court to allow and extend the flexibility that *Sony* granted us, and to consider that the needs of the next generation of students might include the uses of technologies, methods, and theories that none of us could predict.

Respectfully submitted,

ROY I. LIEBMAN
528 8th Avenue
New York, NY 10018
(212) 340-0647

Counsel of Record
for Amici Curiae

MARCH 2005

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[i] Neil Weinstock Netanel, "Copyright and Democratic Civil Society," *Yale Law Journal* 106, no. 2 (1996). Also see Siva Vaidhyanathan, *Copyrights and Copywrongs : The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001).
[ii] 17 U.S.C., § 107.
[iii] *Sony Corp. V. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
[iv] *Media Education Foundation: About* [World Wide Web page] (Media Education Foundation, [cited February 15 2005]); available from http://www.mediaed.org/about. Also see Kembrew McLeod, *Freedom of Expression® : Overzealous Copyright Bozos and Other Enemies of Creativity*, 1st ed. (New York: Doubleday, 2005).

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[v] Andrea L. Foster, "Justice Department Wants Colleges to Do More to Stop File Sharing," *The Chronicle of Higher Education*, July 30 2004.
[vi] Henry Jenkins, e-mail correspondence to Siva Vaidhyanathan, February 23 2005.
[vii] Wolfgang Nejdl et al., "Edutella: A P2p Networking Infrastructure Based on Rdf" (paper presented at the WWW2002, Honolulu, May 7-11 2002).
[viii] Benjamin Ahlborn, Wolfgang Nejdl, and Wolf Siberski, "Oai-P2p: A Peer-to-Peer Network for Open Archives," (2002) Also see Peter Haase et al., "Bibster--a Semantics-Based Bibliographic Peer-to-Peer System," *Web Semantics: Science, Services and Agents on the World Wide Web* 2, no. 1 (2004).
[ix] Andrew Oram and Safari Books Online., *Peer-to-Peer : Harnessing the Power of Disruptive Technologies*, 1st ed. (Beijing ; Cambridge [Mass.]: O'Reilly, 2001). Also see Siva Vaidhyanathan, *The Anarchist in the Library : How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System* (New York: Basic Books, 2004).
[x] Tim Goral, "Recording Industry Goes after Campus P-2-P Networks: Suit Alleges $97.8 Billion in Damages," *Professional Media Group LCC* 2003. Also see Lawrence Lessig, *Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004).
[xi] *Metro-Goldwyn-Mayer Studios Inc. V. Grokster Ltd.*, 380 F3d 1154 (2004).
[xii] *In Re Aimster Copyright Litigation*, 334 F. 3d 643 (2003).
[xiii] *American Geophysical Union V. Texaco, Inc.*, 37 F. 3d 881 (1994). Also see
[xiv] Tino Balio, *The American Film Industry*, Rev. ed. (Madison, Wis.: University of Wisconsin Press, 1985). Also see Janet Staiger, "Combination and Litigation: Structures of U.S. Film Distribution, 1896-1917," *Cinema Journal* (1983). Also see Siva Vaidhyanathan, *Copyrights and Copywrongs : The Rise of Intellectual Property and How It Threatens Creativity*.